IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34678

JIMMIE HAROLD CAUDLE, JR.,	)	**2009 Unpublished Opinion No. 442**
	)	
Plaintiff-Appellant,	)	**Filed: April 30, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
BONNEVILLE COUNTY,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Jon J. Shindurling, District Judge.

Order denying appellant's motion for summary judgment and granting respondent's motion for summary judgment, affirmed.

Jimmie H. Caudle, Jr., Orofino, pro se appellant.

Anderson, Nelson, Hall, Smith, P.A.; Blake G. Hall, Idaho Falls, for respondent.

GUTIERREZ, Judge

Jimmie Harold Caudle, Jr., appeals from the district court's order denying his motion for summary judgment and granting Bonneville County's motion for summary judgment. We affirm.

I.
BACKGROUND

In August, 2005, officers from the Bonneville County Sheriff's Department arrested Caudle at his home pursuant to an outstanding warrant. Caudle did not cooperate with the officers, and was subsequently charged with resisting and obstructing an officer. Caudle was acquitted following a trial on that charge, and filed a civil complaint against Bonneville County (the County) for violations of his civil rights due to illegal arrest, assault, and battery. The district court denied Caudle's motion for appointment of an attorney, but allowed him to file an amended complaint. Following the County's answer, both parties moved for summary

judgment. The court granted summary judgment to the County and dismissed Caudle's complaint with prejudice. This appeal timely followed.

II.

DISCUSSION

Caudle begins his appeal by asserting that *pro se* litigants are treated with great deference due to their lack of legal training. However, in Idaho, *pro se* litigants are held to the same standards and rules as those represented by an attorney. *Murray v. Spalding*, 141 Idaho 99, 101, 106 P.3d 425, 427 (2005); *Twin Falls County v. Coates*, 139 Idaho 442, 444, 80 P.3d 1043, 1045 (2003). *Pro se* status does not excuse parties from adhering to procedural rules, even though they may be unaware of such requirements. *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997).

Caudle raises six issues on appeal; we will only address three of those issues. A party waives an issue on appeal if either argument or authority is lacking. *Powell v. Sellers*, 130 Idaho 122, 128, 937 P.2d 434, 440 (Ct. App. 1997). Although Caudle asserts that the district court erred by not granting a default judgment, by failing to compel mediation, and by failing to compel discovery, he does not support any of those assertions with authority. The remaining issues on appeal are whether the district court erred by denying Caudle's motion to disqualify for cause, whether the district court erred by denying his motion for appointment of counsel, and whether the district court erred by granting the County's motion for summary judgment and dismissing his complaint. Both Caudle and the County request attorney fees on appeal.

A. The District Court Did Not Err by Denying Caudle's Motion to Disqualify for Cause

Prior to filing his amended complaint, Caudle filed a motion to disqualify the district court judge assigned to his case pursuant to Idaho Rule of Civil Procedure 40(d)(2)(A)(4). That rule states, in relevant part, that "[a]ny party to an action may disqualify a judge or magistrate for cause from presiding in any action upon any of the following grounds . . . [t]hat the judge or magistrate is biased or prejudiced for or against any party or the case in the action." In order for a judge to be disqualified under this section, the alleged bias and prejudice must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his or her participation in the case. *Desfosses v. Desfosses,* 120 Idaho 27, 29, 813 P.2d 366, 368 (Ct. App. 1991). This Court reviews the denial of a motion to disqualify for cause under an abuse of discretion standard. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*,

134 Idaho 84, 88, 996 P.2d 303, 307 (2000); *see also Smith v. Smith*, 124 Idaho 431, 435, 860 P.2d 634, 638 (1993); *Bell v. Bell*, 122 Idaho 520, 529, 835 P.2d 1331, 1340 (Ct. App. 1992).

Caudle asserts on appeal that the district court's "erroneous rulings" in the underlying case are proof of bias and prejudice. However, adverse rulings, by themselves, do not demonstrate disqualifying bias. *Samuel*, 134 Idaho at 88, 996 P.2d at 307; *Bell*, 122 Idaho at 530, 835 P.2d at 1341. Furthermore, neither Caudle's motion for disqualification nor any accompanying affidavits are included in the record on appeal. An affidavit "stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion" must accompany the motion for disqualification. I.R.C.P. 40(d)(2)(B). It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. *Powell*, 130 Idaho at 127, 937 P.2d at 439. In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error. *Id.* The judge denied Caudle's motion for disqualification because his recusal in other civil matters filed by Caudle had to do with the subject matter of the actions, and not with Caudle himself. We find no error in the judge's reasoning and conclude that he did not abuse his discretion by denying Caudle's motion for disqualification for cause.

B. The District Court Did Not Err by Denying Caudle's Motion for Appointment of Counsel

Caudle asserts that the district court erred by denying his motion for appointment of counsel. In support of this contention he cites to the standards for appointing counsel under the Uniform Post Conviction Procedures Act, *Charboneau v. State*, 140 Idaho 789, 102 P.3d 1108 (2004), and 28 U.S.C. § 1915, which allows a court to appoint counsel in federal civil actions when the plaintiff proceeds in *forma pauperis*. Neither of these applies in this case, as this is not a proceeding under the UPCPA, and federal procedures do not control in state actions. The constitutional right to counsel arises only in criminal actions. U.S. CONST. amend. VI; IDAHO CONST. art. 1, § 13; *Lee v. State*, 122 Idaho 196, 198-99, 832 P.2d 1131, 1133-34 (1992). In a civil case such as this, the district court had no authority to appoint counsel for Caudle because he had no constitutional or statutory right to appointed counsel. *See, e.g.*, *Murray*, 141 Idaho at 101, 106 P.3d at 427. Therefore, the district court did not err by denying Caudle's motion for appointment of counsel.

C. The District Court Properly Ordered Summary Judgment in Favor of the County

Caudle's complaint alleged violations of the Idaho Constitution, the United States Constitution, and the Idaho Code. He asserted that the officers, as employees of the County, willfully and maliciously conducted an illegal arrest, and assaulted and battered him. He thus raised claims under 42 U.S.C. § 1983 and the Idaho Tort Claims Act. We will address the court's grant of summary judgment as to each in turn.

We first note that summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. On appeal, we exercise free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986). When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint Sch. Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct. App. 1992). The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000). Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders*, 125 Idaho at 874, 876 P.2d at 156.

The United States Supreme Court, in interpreting Federal Rule of Civil Procedure 56(c), which is identical in all relevant aspects to I.R.C.P. 56(c), stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (citations omitted). The language and reasoning of *Celotex* has been adopted in Idaho. *Dunnick*, 126 Idaho at 312, 882 P.2d at 479.

1. 42 U.S.C. § 1983

Caudle's complaint against the County asserted violations of his state and federal constitutional rights. Section 1983 provides that every person who acts under the color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages. The statute provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. This section provides an individual with a cause of action only where the rights allegedly violated are secured by the federal Constitution or the laws of the United States. *Cope v. State*, 108 Idaho 416, 417, 700 P.2d 38, 39 (1985). Section 1983 does not provide a cause of action for violations of a state constitution. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Therefore, the court properly dismissed Caudle's claims alleging violations of the Idaho Constitution.

The United States Supreme Court determined that Congress, when it enacted 42 U.S.C. § 1983, intended "municipalities and other local government units to be included among those persons to whom § 1983 applies." *Monell v. Dep't of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 690 (1978); *Limbert v. Twin Falls County*, 131 Idaho 344, 347, 955 P.2d 1123, 1126 (Ct. App. 1998). Counties, therefore, can be sued directly under section 1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at

690. Put another way, a county can be sued pursuant to section 1983 where the policy or unofficial custom deprives an individual of his constitutional rights or causes an employee to violate another's rights. *Id.* at 690-92; *Nation v. State Dep't of Corr.*, 144 Idaho 177, 186, 158 P.3d 953, 962 (2007); *Herrera v. Conner*, 111 Idaho 1012, 1019, 729 P.2d 1075, 1082 (Ct. App. 1986). However, a governmental entity cannot be held liable under section 1983 for *respondeat superior*; a county will not be liable solely because it employs a tortfeasor. *Monell*, 436 U.S. at 691; *Nation*, 144 Idaho at 186, 158 P.3d at 962; *Limbert*, 131 Idaho at 347, 955 P.2d at 1126.

In order to survive summary judgment, Caudle was required to show that his constitutional rights were violated, and that a policy or custom of the County caused the officers to violate those rights. The district court concluded that Caudle had failed to present evidence showing the County had a policy or custom encouraging illegal arrests or the battery of persons arrested pursuant to a warrant.[1] We agree. A single incident of unlawful arrest, standing by itself, is not enough to support an inference that the County had an official policy which led to the violation of Caudle's rights. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986); *City of Oklahoma v. Tuttle*, 471 U.S. 808 (1985); *Anderson v. City of Pocatello*, 112 Idaho 176, 186, 731 P.2d 171, 181 (1986); *Herrera*, 111 Idaho at 1019, 729 P.2d at 1082. The only evidence Caudle presented consisted of the audio and video recording of his arrest. While the video depicts the officers using force to effectuate the arrest of Caudle, including spraying mace and physically restraining him, it does not necessarily show that the officers violated his constitutional rights. Furthermore, the video does not in any way show that the County encouraged officers to use excessive force during the arrest or authorized the actions of the officers in this particular instance. Caudle has failed to provide any evidence on an essential element of this claim. Therefore there were no issues of material fact relating to whether the

---

[1] The County asserts on appeal that Caudle failed to argue or present evidence to the district court regarding the existence of a policy that led to the violation of his rights prior to summary judgment. We are therefore asked to conclude that Caudle is precluded from appealing the court's dismissal because a party cannot raise a cause of action for the first time during summary judgment. *Maroun v. Wyreless Systems, Inc.*, 141 Idaho 604, 613-14, 114 P.3d 974, 983-84 (2005); *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 178, 75 P.3d 733, 739 (2003). However, the County's policy is an element of the claim under section 1983, and is not a new cause of action unto itself. Furthermore, the district court concluded that Caudle presented evidence and argument to support his theory of a policy prior to summary judgment proceedings.

County had a policy that led to the violation of Caudle's federal constitutional rights, and the County was entitled to judgment as a matter of law on the section 1983 claims.

2. Idaho Tort Claims Act

Caudle also brought claims against the County that are covered by the Idaho Tort Claims Act (ITCA or Act). I.C. §§ 6-901 to -929. The Act waives sovereign immunity for the State of Idaho as well as smaller governmental entities within the state.

> Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting with the course and scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the State of Idaho. . . .

I.C. § 6-903(a). The district court granted summary judgment on Caudle's claims of assault and battery for two reasons: first, because no notice of tort claim was timely filed pursuant to the Act, and second, because the County was immune from suit for assault and battery.

The Act provides in relevant part that

> all claims against an employee of a political subdivision . . . for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

I.C. § 6-906. The Act further provides that "[n]o claim or action shall be allowed against a governmental entity or its employee unless the claim has been presented and filed within the time limits prescribed by this act." I.C. § 6-908. The Idaho Supreme Court has repeatedly held that compliance with this notice requirement is a mandatory condition precedent to bring suit against a county, the failure of which is fatal to a claim, no matter how legitimate. *Magnuson Props. P'ship v. City of Coeur d'Alene*, 138 Idaho 166, 169-70, 59 P.3d 971, 974-75 (2002); *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987). The 180-day notice period begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time. *Magnuson Props. P'ship*, 138 Idaho at 169, 59 P.3d at 974; *Ralphs v. City of Spirit Lake*, 98 Idaho 225, 227, 560 P.2d 1315, 1217 (1977). Knowledge of facts which would put a reasonably prudent person on inquiry triggers the 180-day period. *McQuillen*, 113 Idaho at 722, 747 P.2d at 744.

The date of the allegedly wrongful act in this case was August 31, 2005, the date of Caudle's arrest. The 180-day period ended on February 27, 2006. However, Caudle's tort claim notice was not filed until March 15, 2006. Consequently, the district court properly dismissed all of Caudle's state law claims.

Even if Caudle had timely filed his claims against the County, summary judgment was still appropriate in this case because the County has immunity from the charges. Idaho Code Section 6-904(3) provides that a "governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which . . . arises out of assault [or] battery." Furthermore, a "governmental entity may refuse a defense or disavow and refuse to pay any judgment for its employee if it is determined that the act or omission of the employee was not within the course and scope of his employment or included malice or criminal intent." I.C. § 6-903(c).

In this case, Caudle alleged that the officers willfully and maliciously assaulted and battered him. As used in the Act, malice means the intentional commission of a wrongful or unlawful act, without legal justification or excuse, and with ill will, whether or not injury was intended. *Anderson*, 112 Idaho at 188, 731 P.2d at 183. If the officers acted without malice or criminal intent, the County is not liable for the alleged assault or battery upon Caudle pursuant to the express immunity of I.C. § 6-904(3), nor is it liable for the allegedly malicious acts of the officers resulting in the assault and battery pursuant to I.C. § 6-903(c).[2] *See Sprague v. City of Burley*, 109 Idaho 656, 669-70, 710 P.2d 566, 579-80 (1985); *Herrera*, 111 Idaho at 1022, 729 P.2d at 1085. There were no issues of material fact regarding the County's liability under the Act; the district court did not err by granting summary judgment to the County on Caudle's claims under the ITCA.

III.

ATTORNEY FEES

Both Caudle and the County seek attorney fees on appeal. As Caudle is not the prevailing party, he is not entitled to any attorney fees on appeal. The County seeks attorney

---

[2] Caudle did not raise any claims against the officers in their individual capacities; therefore it is only the liability of the County that was at issue. Had he asserted such claims, liability, if proven, would have attached to the individual officers alone. *Limbert v. Twin Falls County*, 131 Idaho 344, 346, 955 P.2d 1123, 1125 (Ct. App. 1998).

fees pursuant to 42 U.S.C. § 1988, I.C. § 12-117, and I.C. § 6-918A. Fees cannot be awarded under section 12-117 because section 1988 is the exclusive provision for awarding attorney fees for claims brought under section 1983, *Willie v. Board of Trustees*, 138 Idaho 131, 137, 59 P.3d 302, 308 (2002), while section 6-918A provides the exclusive authority for awarding attorney fees for actions brought under the ITCA, *Athay v. Stacey*, 146 Idaho 407, 413, 196 P.3d 325, 331 (2008).

Attorney fees can be awarded to the prevailing party in proceedings to enforce rights under 42 U.S.C. § 1983. 42 U.S.C. § 1988. However, prevailing defendants are only entitled to attorney fees under this section where the action is "unreasonable, frivolous, meritless, or vexatious." *Legal Servs. of N. Cal. v. Arnett,* 114 F.3d 135, 141 (9th Cir. 1997); *Karr v. Bermeosolo*, 142 Idaho 444, 449, 129 P.3d 88, 93 (2005). To meet this standard, the plaintiff's action must be "groundless or without foundation." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980). "The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees." *Id.* The limitations of this standard "apply with special force in actions initiated by uncounseled prisoners." *Id.* at 15. Attorney fees "should rarely be awarded against such plaintiffs." *Id.* The County asserts that Caudle's appeal was frivolous because the district court clearly did not misapply the law, and that the appeal was vexatious due to Caudle's desire to harass the County. The fact that summary judgment was granted to the County does not, by itself, make Caudle's original action or appeal groundless or frivolous. *See id.* at 15-16. Although Caudle failed to support some of his arguments on appeal with authority, the main issue on appeal, whether the district court properly granted summary judgment to the County, on Caudle's section 1983 claim was not brought frivolously. *But see Franceschi v. Schwartz*, 57 F.3d 828, 832 (9th Cir. 1995) (awarding attorney fees against attorney representing himself who should have known the defendants were immune and failed to show any reason why immunity did not apply). Caudle raised colorable issues on appeal, supported by argument and authority, to rectify the perceived violations of his civil rights.

The County also seeks attorney fees on appeal pursuant to I.C. § 6-918A. Fees under this section are discretionary, and may be awarded only when the party against whom fees are sought is "guilty of bad faith in the commencement, conduct, maintenance or defense of the action." I.C. § 6-918A. Bad faith is defined as dishonesty in belief or purpose. *Cordova v. Bonneville County Joint Sch. Dist. No. 93*, 144 Idaho 637, 643, 167 P.3d 774, 780 (2007); *Cobbley v. City of*

Challis, 143 Idaho 130, 135, 139 P.3d 732, 737 (2006). This is an exceptionally rigorous standard. *Bissett v. Unnamed Members of Political Compact*, 111 Idaho 863, 865, 727 P.2d 1291, 1293 (Ct. App. 1986). The County has not shown that Caudle pursued this appeal in bad faith. Therefore no attorney fees will be awarded to the County.

IV.
CONCLUSION

Caudle, as a *pro se* litigant and appellant, is held to the same standards as a party represented by an attorney. He failed to show that the district court judge erred by failing to disqualify himself, or by failing to appoint counsel to represent Caudle. The district court did not err by denying Caudle's motion for summary judgment and granting the County's motion. Caudle failed to show that the County had a policy or custom which caused the officers to violate his federal constitutional rights; therefore the County was entitled to judgment as a matter of law on the 42 U.S.C. § 1983 action. Caudle's claims under the ITCA were not timely, and the County was immune from suit under the Act because Caudle's complaint was based on assault and battery and Caudle asserted that the officers acted with criminal intent. Therefore the district court did not err by granting summary judgment in favor of the County on all of Caudle's claims.

Accordingly, the order of the district court denying Caudle's motion for summary judgment and granting the County's motion for summary judgment is affirmed. The County is not entitled to attorney fees on appeal, as Caudle's appeal was not pursued unreasonably, frivolously, or with bad faith. Costs, however, are awarded to the County as a matter of right pursuant to Idaho Appellant Rule 40.

Chief Judge LANSING and Judge PERRY **CONCUR**.